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Peter Nygh
Bond University

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Peter Nygh*

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I. INTRODUCTION

Australia, like the United States and Canada, is a federation of six states and two self-governing territories¹ that have been left with considerable autonomy to regulate private law. Unlike the United States and Canada (if one can still include Quebec), Australia has the advantage of a shared common law subject to the interpretation of the one supreme court, the High Court of Australia.

As the Australian Law Reform Commission remarked in its report on choice of law: "The main scope for conflict within Australia arises in respect

* Professor of Law, Bond University, Queensland, Australia.

1. I am not considering either the non selfgoverning Jervis Bay Territory and its three hundred inhabitants situated some two hundred kilometers south of Sydney (which for practical purposes is part of the Australian Capital Territory) or the three inhabited external territories of Christmas Island, the Cocos (Keeling) Islands, and Norfolk Island. So far these territories have not raised any conflict of laws problems although Norfolk Island might offer some interesting "antiques" for the discriminating forum shopper.

of statute law,”² perhaps because one jurisdiction reforms the common law and the other does not, or because each reforms the common law in different ways. For example, my home state of New South Wales was slow to abolish the common-law rule that the plaintiff’s contributory negligence is an absolute bar to recovery³ and has never completely abolished interspousal tort immunity.⁴

The major sources of conflicts within Australia can readily be identified. First, New South Wales’s continued adherence to the six-year limitation period first set by James I as a general period of limitation contrasts with other states that have followed modern English precedent in imposing a three-year period for personal injury actions.⁵ Second, states differ substantially in the law of defamation. In some states the common law still prevails, while others have either codified the law or substantially changed it. In some states truth is a sufficient defense; in others it must also be shown that the making of the statement is for the public benefit. The abolition in New South Wales of the right to recover punitive damages in defamation has made the A.C.T. a refuge for the defamed.⁶ Third, the introduction of no-fault insurance schemes for motor accidents in some jurisdictions⁷ and the capping of damages recoverable in relation to such accidents in others⁸ leave the State of Queensland as a bastion of the common law. There are differences in prejudgment and postjudgment rates of interest⁹ and in the rates of discount used in calculating the lump sum award for future economic loss.¹⁰ As a result, certain jurisdictions in Australia will offer a plaintiff either a recovery that is denied in the “natural forum”¹¹ or the chance of a much greater recovery than could be

2. Australian Law Reform Commission Report No. 58 (1992).

3. See *Anderson v. Eric Anderson Radio & T.V. Pty. Ltd.*, 114 C.L.R. 20 (1965).

4. See *Warren v. Warren*, [1972] Q.R. 386; *Corcoran v. Corcoran*, [1974] V.R. 164. The problem disappeared with the purported abolition of interspousal immunity in section 119 of the federal Family Law Act 1975, but the constitutional validity of this provision has never been tested.

5. See *McKain v. R.W. Miller & Co. (S. Austl.) Pty. Ltd.*, 174 C.L.R. 1 (1991). An attempt has been made to reduce the conflict by the enactment of the Choice of Law (Limitation Periods) Act 1993 in New South Wales and Victoria, but this legislation may not affect tort actions. See P.M. NORTH & J.J. FAWCETT, *CHESHIRE & NORTH’S PRIVATE INTERNATIONAL LAW* 80 (12th ed. 1992) (commenting on the equivalent Foreign Limitations Period Act 1984 (Eng.)).

6. See, e.g., *Waterhouse v. Australian Broadcasting Corp.*, 97 F.L.R. 1 (1989).

7. See *Breavington v. Godleman*, 169 C.L.R. 41 (1988).

8. See *Stevens v. Head*, 176 C.L.R. 433 (1993).

9. *Guidera v. Gov’t Ins. Office*, 11 M.V.R. 423 (1990).

10. *Amor v. Macpak Pty. Ltd.*, 95 F.L.R. 10 (1989).

11. In the sense used by Lord Goff of Chieveley, the “natural forum” is the country with which the action has the closest and most real connection. *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] App. Cas. 460, 478 (Eng.) (quoting the *Abidin Daver*, [1984] App. Cas. 398, 415 (Eng.)).

had in that forum. This may lead to the much decried practice of “forum shopping.”

Who is a forum shopper? In a strict sense this term should only refer to a person who resorts to a jurisdiction other than the natural forum primarily for the purpose of gaining a procedural or substantive advantage under the law or practice of that jurisdiction. In some cases a plaintiff might go to an apparently unrelated jurisdiction to seek such advantage. For example, in *Keeton v. Hustler Magazine Inc.*¹² the plaintiff brought action in the only jurisdiction where her action was not barred by statute. There are many more cases in which the plaintiff had a choice based on reasonable grounds among several jurisdictions and chose the more advantageous.¹³ In a broader and nonpejorative sense “forum shopper” may refer to any person who seeks the more advantageous forum from among several available. The forum selected might be the natural forum or it might be less appropriate. In any case, forum shopping arises when the plaintiff has a choice.

Those who oppose forum shopping argue that the plaintiff should not have a choice so far as outcome is concerned.¹⁴ I leave aside the issue of choice based on considerations of convenience. Forum shopping opponents would agree with the Australian Law Reform Commission that uniformity of result, at least within Australia, is a desirable aim of judges and legislators.¹⁵ If that goal is to be achieved, Australian jurisdictions must either adopt choice-of-law rules that ensure uniformity of outcome or restrict the jurisdictional choice of plaintiffs. I will discuss those options in this Paper. The discussion will be confined to choice of law and jurisdiction within Australia, as it is clearly much harder to achieve uniformity of outcome on an international level.

12. 465 U.S. 770 (1984).

13. The plaintiff in *McKain v. R.W. Miller & Co. (S. Austl.) Pty. Ltd.*, 174 S.L.R. 1 (1991), brought action in New South Wales where he normally lived rather than in South Australia where the accident occurred and where he was statutorily barred. Equally, Mrs. Stevens brought suit in Queensland (where the defendant resided) rather than in either New South Wales (where she had been run over and where the damages recoverable were capped) or New Zealand (where she lived and where a no-fault scheme was in operation). *Stevens v. Head*, 176 C.L.R. 433 (1993).

14. There are scholars who consider forum shopping to be a healthy part of the international legal system in that it allows plaintiffs to by-pass outdated and restrictive laws. See Juenger, *What is Wrong with Forum Shopping*, 16 SYDNEY L. REV. 5 (1994). *Contra* Opeskin, *The Price of Forum Shopping: A Reply*, 16 SYDNEY L. REV. 14 (1994); Juenger, *Forum Shopping: A Rejoinder*, 16 SYDNEY L. REV. 28 (1994).

15. A.L.R.C. Report No. 58, *supra* note 2, ¶ 2.4 (1992).

II. CHOICE OF FORUM

The common law imposed certain restrictions on the exercise of judicial jurisdiction based on notions of territorial power.¹⁶ Far from restricting the choice of forum, the Australian legislatures have widened considerably the options for plaintiffs in two unique pieces of legislation (the federal Service and Execution of Process Act 1992 and the joint federal/state/territorial cross-vesting legislation) and the borrowed mechanism of diversity jurisdiction.

A. Jurisdiction Based on Service Within Territory

The traditional rule was aptly stated by Chief Justice Dixon in *Laurie v. Carroll*: “The defendant must be amenable or answerable to the command of the writ. His amenability depended and still primarily depends upon nothing but presence within the jurisdiction.”¹⁷ The continued existence of tag or transient jurisdiction has been repeatedly affirmed in recent years by Australian courts.¹⁸ It matters not that the defendant has come into the jurisdiction at the invitation of the plaintiff and in collusion against the defendant’s insurer.¹⁹ Nor does it make any difference that the defendant came into the jurisdiction in reply to a summons or subpoena.²⁰ Once the defendant is served within the jurisdiction, the court has a general jurisdiction over the cause of action wherever it may have arisen.²¹

Provided the plaintiff can find his or her prey within the state or territory, the choice of forum will usually be safe. The High Court of Australia rejected in *Oceanic Sun Line Special Shipping Co. Inc. v. Fay*²² the concept of forum non conveniens as developed in the United States and the United Kingdom.²³ Instead it developed in *Voth v. Manildra Flour Mills Pty. Ltd.* the notion that a plaintiff is prima facie entitled to the jurisdiction it has regularly invoked unless it can be established that the forum chosen is “clearly inappropriate.”²⁴

16. See the remarks of Chief Justice Dixon in *Laurie v. Carroll*, 98 C.L.R. 310, 323, (1958) following the dictum of Justice Holmes in *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) that “[t]he foundation of jurisdiction is physical power.”

17. *Laurie*, 98 C.L.R. at 323.

18. See, e.g., *Evers v. Firth*, 10 N.S.W.L.R. 22 (1987); *Perrett v. Robinson*, [1985] 1 Qd. 83; *Tuckerman v. Neville*, [1992] 2 Q.R. 657; cf. *Burnham v. Superior Court*, 495 U.S. 604 (1990).

19. *Evers v. Firth*, 10 N.S.W.L.R. 22 (1987).

20. *Baldry v. Jackson*, [1976] 1 N.S.W.L.R. 19.

21. *Tuckerman v. Neville*, [1992] 2 Q.R. 657.

22. 165 C.L.R. 197 (1988).

23. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981); *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] App. Cas. 460.

24. 171 C.L.R. 538 (1990).

The onus rests upon the defendant²⁵ and can basically be discharged only by showing that the cause of action arose outside the forum and the burden imposed on the defendant by having to appear in the forum outweighs any legitimate advantage such as costs or favorable limitation period that the plaintiff enjoys in the forum.²⁶ It is not surprising that successful attempts to stay local actions on this ground have been rare. Since the introduction of the cross-vesting scheme, it is also possible to seek the transfer of proceedings from one superior court to another. However, it is uncertain whether the onus on the applicant for such a transfer differs substantially from that laid down in *Voth v. Manildra Flour Mills Pty. Ltd.*²⁷

*B. Jurisdiction Based on Interstate Service
 Under the Service and Execution of Process Act 1992*

In section 51 of the Australian Constitution, the drafters granted the Federation the legislative power to recognize "throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States."²⁸ This power was exercised in relation to judicial proceedings in the first year of federation in the Service and Execution of Process Act 1901. Section 4 of that statute, in effect for ninety-three years, authorized the service of process out of any Australian court of record on any person within Australia, thus lifting by federal authority the limits state borders set on the service of process issued out of state courts. However, if the defendant failed to appear or protested the jurisdiction of the court, leave to proceed was required under section 11(1) which required a certain nexus between the litigation and the forum much along the lines of the English Supreme Court Rules, as they then stood.²⁹

The Service and Execution of Process Act 1992, which came into effect on April 10, 1993, has taken that process a step further. The 1992 act did away with the nexus requirements of the previous statute. Unlike its predecessor, the act applies to the exclusion of state and territorial laws dealing with service of process within Australia³⁰ and provides in section 15(1) for initiating process issued out of any Australian court to be served throughout Australia, including its external territories. As a result, the territorial ambit of

25. *Westpac Banking Corp. v. P & O Containers Ltd.*, 102 A.L.R. 239, 243-44 (1991) (per Pincus, J.).

26. This was the basis upon which jurisdiction was denied in *Voth*, 171 C.L.R. at 538, but only after the defendant undertook not to plead the statute of limitations of Missouri, the "natural" forum.

27. *Id.*; see also *Waterhouse v. Australian Broadcasting Corp.*, 97 F.L.R. 1 (1989).

28. AUSTL. CONST. § 51 (xxv).

29. See *Luke v. Mayoh*, 29 C.L.R. 435, 438-39 (1921).

30. Service and Execution of Process Act 1992 (Cth) § 8(4).

the Local Court at North Sydney is extended from the icy wastes of Mawson Base in the Australian Antarctic Territory to the idyllic Indian Ocean Islands and the very tip of Cape York in the north! Since the act does no more than extend the common-law jurisdiction based on service, the defendant need only be a transient visitor to any part of Australia and the cause of action may be foreign to Australia.³¹

In principle a plaintiff can choose a venue within the same geographic range or even, following the example of the late Professor Orr, sue the defendant in every court in the federation.³² Does this mean that malicious plaintiffs can run riot and haul defendants before a forum three thousand or more kilometers away?

The change, recommended by the Australian Law Reform Commission in its Report on Service and Execution of Process,³³ was designed to avoid the needless and highly technical problems that arose under the previous legislation of discovering where a contract was broken or a tort committed. Instead it proposed that the test should be one of determining the appropriate venue. Section 20(3) allows a court, other than a Supreme Court,³⁴ to grant a stay of proceedings to a defendant on the ground that a court of another state or territory is the appropriate court to determine the matter. Section 20(4) directs the court on such an application to consider the following factors:

- (a) the places of residence of the parties and the witnesses likely to be called in the proceeding;
- (b) the place where the subject matter of the litigation is situated;
- (c) the financial situation of the parties, so far as the court is aware of them;
- (d) any agreement between the parties as to the court or the place in which the proceedings should be instituted;
- (e) the law that would be most appropriate to apply in the proceeding; and
- (f) whether a related or similar proceeding has been commenced against the person served or another person.

The plaintiff's choice of the place of issue is not itself a relevant consideration.

Provision (e) is worthy of note because it deprives the plaintiff of the *prima facie* presumption in favor of the choice of forum that the High Court

31. See the comments of Master Hogan in *Kontis v. Barlin*, 115 A.C.T.R. 11, 18 (1993). In *McEntee v. Connor*, [1994] A.C.L.R. 125 Tas. 6, a writ regarding a tort committed in Japan was issued out of the Supreme Court of Tasmania and served under the Service and Execution of Process Act 1992 on a defendant in Western Australia.

32. *Orr v. Isles*, [1963] NSW 616. The plaintiff in that case brought suit in every Supreme Court outside Tasmania in an attempt to vindicate himself after the Tasmanian Court dismissed his wrongful dismissal action against the University of Tasmania.

33. Service and Execution of Process, A.L.R.C. Report No. 40.

34. Service and Execution of Process Act 1992 (Cth) § 20(1).

conferred generally on the plaintiff in *Voth v. Manildra Flour Mills Proprietary Ltd.*³⁵ The reference to the “appropriate” forum is most likely a reference to the “more appropriate” or “natural forum,” as defined by Lord Goff of Chieveley in *Spiliada Maritime Corp. v. Cansulex Ltd.*³⁶ It is unlikely that any Australian forum could be described as clearly inappropriate.³⁷ The plaintiff whose action is stayed under this provision must start fresh in the more appropriate forum. No doubt, if the forum were unreasonably chosen the plaintiff would be penalized in costs. There are therefore some practical sanctions against abuse.

In the case of process issued out of a supreme court and served under the Service and Execution of Process Act 1992, the appropriate remedy for a defendant who complains that the forum selected by the plaintiff is not appropriate is to seek a transfer to another participating superior court pursuant to section 5 of the cross-vesting legislation or to seek a stay under common-law principles.³⁸ The principles to be applied to an application for a stay under section 20(2) of the act or for a transfer under section 5 of the cross-vesting legislation ought to be the same.³⁹

C. The Cross-vesting Legislation

The cross-vesting scheme has been in operation since July 1, 1988, and is implemented through the federal Jurisdiction of Courts (Cross-vesting) Act 1987 and equivalent legislation enacted in each of the states and the two self-governing territories. It is beyond the scope of this Paper to explain the system in detail but fundamentally its purposes are: (a) to invest all state and territorial supreme courts with the jurisdiction of the federal and family courts subject to certain specified exceptions, (b) to invest the federal and family courts with the whole of the jurisdiction of the state and territorial supreme courts, (c) to invest each state and territorial supreme court with the whole of the jurisdiction of all other state and territorial supreme courts, and (d) to provide a mechanism whereby proceedings filed in an inappropriate court can be transferred to another superior court within the scheme.⁴⁰ The legislation was designed primarily to overcome embarrassing gaps that had opened between federal and state jurisdictions; however, the extension of cross-vesting

35. 171 C.L.R. 538 (1990).

36. [1987] App. Cas. 460, 477-78.

37. *McEntee v. Connor*, [1994] A.C.L.R. 125 Tas. 6.

38. *Id.*; *Dawson v. Baker*, 120 A.C.T.R. 11 (1994).

39. *Dawson v. Baker*, 120 A.C.T. 11 (1994).

40. For a general discussion of the operation of the scheme, see Moloney & McMaster, *Cross-vesting of Jurisdiction: A Review of the Operation of the National Scheme*, A.I.J.A. 1992 and Herbert A. Johnson, *Historical and Constitutional Perspectives on Cross-vesting of Court Jurisdiction*, 19 MELB. U. L. REV. 45 (1993).

on a mutual state and territorial basis has widened the opportunity for forum shopping in truly modern style by allowing the plaintiff to “shop at home.” Does a plaintiff seeking to sue in Sydney based on a nation wide telecast wish to take advantage of the Queensland Defamation Law of 1922? Just plead it in the Sydney proceedings by way of cross-vesting.⁴¹ Does a Queensland Supreme Court judge in proceedings that arise out of a motor accident in Queensland wish to appoint a trustee for a mentally impaired plaintiff resident in New South Wales? Just exercise the powers that a New South Wales Supreme Court judge has under the Protected Estates Act 1983 (N.S.W.).⁴²

Needless to say, the interstate law must be applicable under its own terms to the situation before the court. The New South Wales Supreme Court could not apply through cross-vesting the Queensland Defamation Law to a defamation entirely centered in New South Wales. The jurisdiction must be one that the Queensland court could have exercised, but it is no longer necessary to travel to Queensland to institute proceedings there.

It is more dubious whether cross-vesting can be used to assume personal jurisdiction over the defendant. Assume that a defendant to an action that is entirely located in South Australia is a resident of South Australia and is unlikely to come to New South Wales. Assume further that the plaintiff’s action is statutorily barred in South Australia but not in New South Wales. Can the plaintiff invoke the cross-vested jurisdiction of the Supreme Court of South Australia over defendants personally served there to bring the matter before the New South Wales Court even though the substantive laws of the two states are identical? Justice Rogers in *Seymour-Smith v. The Electricity Trust of South Australia*⁴³ assumed jurisdiction inter alia on this basis, but the majority of the Full Court of the Federal Court in *David Syme & Co. Ltd. v. Grey*⁴⁴ took the view (correct, in my opinion), that the cross-vesting laws are concerned with substantive rather than procedural jurisdiction.⁴⁵ The issue probably is moot in view of the provisions of the Service and Execution of Process Act 1992.⁴⁶

41. *Waterhouse v. Australian Broadcasting Corp.*, 27 N.S.W.L.R. 1 (1992).

42. *Re an Alleged Incapable Person FCC & The Protected Estates Act 1983*, 19 N.S.W.L.R. 541 (1990) (denying recognition of the Queensland order because the required procedure under the N.S.W. statute had not been followed). *But see* *Re H & the Adoption Act*, [1990] A.C.L.D. 1005 (a New South Wales judge made an adoption order under Victorian legislation).

43. 17 N.S.W.L.R. 648, 659-60 (1989).

44. 115 A.L.R. 247, 254, 275 (1992) (per Neaves & Gummow, J.J., respectively; Higgins, J. did not express an opinion).

45. *See also* Keith Mason & James Crawford, *The Cross-vesting Scheme*, 62 AUSTL. L.J. 328, 335-36 (1988).

46. Although § 8(4) of the act would not overrule any procedural effect of cross-vesting, the ready availability of service throughout Australia under § 15(1) solves the problem raised in *Seymour-Smith*.

1. Change of Venue under the Cross-vesting Scheme

To counteract possible abuse of the wider scope for forum selection offered by the cross-vesting legislation and, so far as supreme courts are concerned, by the Service and Execution of Process Act 1992, provision is made for the transfer of proceedings from one supreme court to another in section 5(2) of the cross-vesting legislation.⁴⁷ Such a transfer shall be ordered when it appears to the court in which the proceeding is pending that:

- (i) the relevant proceeding arises out of, or is related to, another proceeding pending in the Supreme Court of another State or Territory and it is more appropriate that the relevant proceeding be determined by that other Supreme Court;
- (ii) having regard to-

(A)

whether, in the opinion of the first court, apart from this Act and any law of a State relating to cross-vesting of jurisdiction, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the first court and capable of being instituted in the Supreme Court of another State or Territory;

(B)

the extent to which, in the opinion of the first court, the matters for determination in the relevant proceeding are matters arising under or involving questions as to the application, interpretation or validity of a law of the State or Territory referred to in sub-sub-subparagraph (A) and not within the jurisdiction of the first court apart from this Act and any law of a State relating to cross-vesting of jurisdiction; and

(C)

the interests of justice,

47. Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth). Other subsections of section 5 deal with various other cross-vesting possibilities: § 5(1) (transfer from state to federal court or Family Court of Australia), § 5(3) (transfers between state supreme court and state family court), § 5(4) (transfers from Federal Court or Family Court of Australia to state and territorial supreme courts), and § 5(5) (transfers between Federal Court and Family Court).

it is more appropriate that the relevant proceeding be determined by that other Supreme Court; or

(iii)

it is otherwise in the interests of justice that the relevant proceeding be determined by the Supreme Court of another State or Territory.

It may be noted that paragraphs (i) and (iii) are not limited to the transfer of cross-vested jurisdiction. Indeed, section 20(1) of the Service and Execution of Process Act 1992 envisions that a defendant complaining that an action has been instituted in the wrong supreme court will make application under section 5(2) of the Jurisdiction of Courts (Cross-vesting) Act 1987.⁴⁸ The same remedy could be sought by a defendant who was personally served within the jurisdiction as a transient visitor. No appeal lies from a decision in relation to the transfer of a proceeding or the reasoning that decision.⁴⁹ In all probability, at least an “onus of persuasion” lies on the applicant for a transfer.⁵⁰

The test to be applied depends on which of the above categories the relevant proceeding falls within. The first category deals with the situation in which related proceedings are pending in different supreme courts. They need not lie between the same parties, but there must either be a certain degree of causality between them,⁵¹ or there must be a “substantial common question that arises in both proceedings.”⁵² Once the requisite link is shown to exist, it becomes a question of which court is more appropriate without giving any specific weight to the choice of forum by the plaintiff.⁵³

The second category covers the situation in which the proceeding, or a substantial part of it, sought to be transferred is based on jurisdiction that the

48. *McEntee v. Connor*, [1994] A.C.T.R. 125 Tas. 6; *Dawson v. Baker*, 120 A.C.T.R. 11 (1994).

49. *Jurisdiction of Courts (Cross-vesting) Acts 1987 § 13(a)*; *Tangalooma Island Resort Pty. Ltd. v. Miles*, 96 F.L.R. 47 (1989).

50. *Bourke v. State Bank*, 85 A.L.R. 61, 76 (1988) (per Wilcox J.); *see also In the Marriage of Chapman & Jansen*, 13 Fam. L.R. 56 (1990); *Leithead v. Leithead*, 15 Fam. L.R. 56 (1991); *Kenda v. Johnson*, 15 Fam. L.R. 369 (1992); *Dawson v. Baker*, 120 A.C.T.R. 11 (1994). For a view that there is no onus, *see Bankinvest A.G. v. Seabrook*, 14 N.S.W.L.R. 711, 727 (1988) (per Rogers A.J.A.); *Rains v. Project Technology Pty. Ltd.* 97 F.L.R. 355 (1989); *Lamshed v. Lamshed*, 35 F.C.R. 111 (1992); *Linter Group Ltd. v. Price Waterhouse*, 9 A.C.S.R. 346 (1992). Although Justice Debelle in *Pegasus Leasing Ltd. v. Tieco Int’l (Austl.) Pty. Ltd.* denied there was a formal onus, he did in fact require the applicant for transfer to indicate some greater advantage to be gained by transfer which would outweigh the plaintiff’s selection of the forum. 61 S.A.S.R. 195 (1993). *See also Johnson*, *supra* note 40, at 45.

51. *Re Hamilton-Irvine*, 94 A.L.R. 428, 432-33 (1991) (per Beaumont, J.).

52. *Skaventzos v. Tirimon*, 61 S.A.S.R. 103 (1993).

53. *Rayner v. Pittard*, 99 F.L.R. 111 (1990); *Acc. Fin. Int’l Sec. Ltd. v. National Trustees Ex’rs & Agency Co. Ltd.*, 99 F.L.R. 432 (1990).

forum can only exercise because of the cross-vested jurisdiction. The decision to transfer the proceeding to the court to which it properly belongs will depend on where the substance of the proceeding lies; if all or most matters raised in the proceeding are cross-vested, the proceeding usually will be transferred to the proper court.⁵⁴ However, if there is a substantial issue within the forum's own jurisdiction to which the cross-vested jurisdiction is incidental, the transfer may be refused.⁵⁵

The third category, perhaps the most relevant, is based on a residual clause that can be invoked by a defendant even though there are no related proceedings and no question of cross-vested jurisdiction.⁵⁶ Although facially the court is given a wide discretion as indicated by the words "otherwise in the interests of justice,"⁵⁷ some judges have taken the view that a transfer should be ordered only when the forum chosen by the plaintiff is "clearly inappropriate."⁵⁸ Others have taken the view that the formula allows the court to choose the more appropriate forum without any specific emphasis in favor of the forum chosen by the plaintiff.⁵⁹ Because section 20(4) of the Service and Execution of Process Act 1992 clearly denies any bias in favor of the plaintiff's choice, it would be unfortunate if the method of challenging jurisdiction indicated by section 20(1) of that act were to employ a different test.⁶⁰

D. Diversity Jurisdiction

Another option for forum selection is through exercising diversity jurisdiction with the High Court of Australia. Section 75(iv) of the Constitution invests the High Court with original jurisdiction in all matters "[b]etween States, or between residents of different States, or between a State and a resident of another State."⁶¹ We are not concerned with the first category, but the last two give the private plaintiff an opportunity to commence an action in

54. *In the Marriage of Chapman & Jansen*, 13 Fam. L.R. 863 (1990); *Re T (an infant)*, [1990] 1 Qd. R. 196, 200 (per Ryan, J.); *Down to Earth Spring Water Pty. Ltd. v. State Bank*, 31 F.C.R. 81 (1991).

55. *Kenda v. Johnson*, 15 F.L.R. 369 (1992).

56. *See, e.g., Waterhouse v. Australian Broadcasting Corp.* 97 F.L.R. 1 (1989).

57. *Jurisdiction of Courts (Cross-vesting) Act 1987*.

58. *Id. Baffsky v. John Fairfax & Sons Ltd.*, 97 A.C.T.R. 1 (1990); *Mullins Inv. Pty. Ltd. v. Elliott Exploration Co. Pty. Ltd.*, [1990] W.A.R. 531.

59. *See, e.g., Bankinvest A.G. v. Seabrook*, 14 N.S.W.L.R. 711, 730 (1988) (per Rogers, A.J.A.) (followed in *Amor v. Macpak Pty. Ltd.*, 95 F.L.R. 10 (1989); *Sunbanc Australia v. Multivest Corp. Ltd.*, 97 F.L.R. 269 (1989); *Chase Corp. (Austl.) Ltd. v. City of Melbourne*, 97 F.L.R. 258 (1989).

60. *See McEntee v. Connor*, [1994] A.C.L.R. 125 Tas. 6; *Dawson v. Baker*, 120 A.C.T.R. 11 (1994).

61. AUSTL. CONST. § 75(iv).

one of the several registries that the High Court maintains throughout the nation.

The term “resident” has been interpreted narrowly so as to exclude corporate personality.⁶² Hence all parties to a diversity suit must be natural persons.⁶³ However, recently the High Court has widened the definition of “state” to include government-owned enterprises, such as railways, that are managed through a government department.⁶⁴

The diversity of residence need not have existed at the time the cause of action arose; it suffices that there is diversity at the time of commencement of the action.⁶⁵ Once jurisdiction exists, it extends to any cause of action wherever it may have arisen.⁶⁶

Although the High Court cannot stay or dismiss such actions on jurisdictional grounds, section 45(1) of the Judiciary Act 1903 (Cth) authorizes the court to remit the proceeding “to any Court of a State which has jurisdiction with regard to the subject matter and the parties.”⁶⁷ The issue under the section is not whether the Court will remit (as it invariably does), but to which court the case will be remitted. In that regard, the High Court has a very wide discretion.⁶⁸

The requirement that the court to which the matter is remitted have jurisdiction over the matter and the parties needs only to be read in a generic sense. The cause of action need be of a kind that that court can entertain, and the party need be a person over whom that court would have jurisdiction if that party had been served within the jurisdiction. Once that generic test has been satisfied, the High Court’s remittal by itself confers jurisdiction.⁶⁹

In determining the court to which the matter should be remitted, the High Court tries to avoid changing the substantive and procedural rights of the parties.⁷⁰ In the case of a conflict of laws, there should be a preference for the jurisdiction of the law indicated by the relevant choice of law rules. Thus, in the case of an action based on a tort, preference has been given to the court of the place where the tort was committed.⁷¹ This, however, might lead to a

62. *Australasian Temperance & Gen. Mut. Life Assurance Soc’y v. Howe*, 31 C.L.R. 290 (1922).

63. *Rochford v. Dayes*, 84 A.L.R. 405 (1989).

64. *Crouch v. Commissioner for Rys. (Qld.)*, 159 C.L.R. 22 (1985). With the “corporatization” of government enterprises, this will become increasingly less likely.

65. Practice Notes, 40 AUSTL. L. J. 361 (1967) (discussing the unreported case, *Dzikowsky v. Mazgay*).

66. *Spratt v. Hermes*, 114 C.L.R. 226, 241 (1965) (per Barwick, C.J.).

67. Judiciary Act 1903 (Cth) § 45(1).

68. *Johnstone v. Commonwealth*, 143 C.L.R. 398 (1979).

69. *Id.* at 408 (per Aickin, J.).

70. *State Bank v. Commonwealth Sav. Bank*, 154 C.L.R. 579, 586 (1984) (per Gibbs, C.J.).

71. See *Johnstone*, 143 C.L.R. at 398; *Robinson v. Shirley*, 149 C.L.R. 132 (1982); *Pozniak*

plaintiff being deprived of a procedural advantage that another forum might have given him or her.⁷² As will be shown later, the very fact that the action has been commenced in the High Court might lead to an escape from certain state and territorial laws, such as a statute of limitations.

If there is no conflict of laws between potentially applicable laws, the High Court will look for the most appropriate forum. Matters that have been considered important in this context include: the place where the plaintiff was hospitalized and whence the medical evidence would have to come,⁷³ which court will be able to hear the matter earlier, the availability of legal aid,⁷⁴ and the defendant's residence.⁷⁵

III. CHOICE OF LAW

As the foregoing has shown, Australia favors a smorgasbord of jurisdictions for hungry plaintiffs. What, if anything, has our law done to achieve the policy of "uniformity of outcome" as specified by the Australian Law Reform Commission? To discuss this, we have to distinguish between (a) jurisdiction based on service, (b) cross-vesting jurisdiction, and (c) diversity jurisdiction.

A. Choice of Law in Jurisdiction Based on Service of Process

When an Australian court assumes jurisdiction, as it does in the vast majority of cases, on the basis of submission to jurisdiction, service within the jurisdiction, or service within Australia pursuant to the Service and Execution of Process Act 1992, it must look to the choice of law rules of the forum to determine the applicable law. In most cases these rules are defined by the common law and are uniform throughout Australia, but they do not necessarily lead to uniformity of outcome.

At one stage it looked as if the majority of the High Court of Australia agreed with Justice Deane when he said:

What is essential is that the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct, property or status at a particular time in a particular part of the national territory will be the same regardless of whereabouts in that territory questions concerning those matters or their legal consequences may arise. In a federation such as Australia where there are a number of

v. Smith, 151 C.L.R. 38 (1982).

72. *Pozniak*, 151 C.L.R. at 38.

73. *Weber v. Aidone*, 36 A.L.R. 345 (1981).

74. *Crouch v. Commissioner for Rys. (Qld)*, 159 C.L.R. 22 (1989).

75. *Guzowski v. Cook*, 149 C.L.R. 128 (1981).

legislatures and a number of distinct court systems, such unity cannot exist unless the legal principles for determining legislative competence and for resolving conflicts between different laws in a particular case will operate with identical results in any of the different court systems.⁷⁶

The “vision splendid” of Justice Deane was rejected two years later by the majority of a differently constituted High Court in *McKain v. R.W. Miller & Co. (SA) Pty. Ltd.*⁷⁷ That majority dismissed the aim of uniformity of outcome and asserted instead that variety was the very spice of federation.⁷⁸ Although the majority returned to forum-oriented choice-of-law rules, the theme adopted by Justice Deane was endorsed by the Australian Law Reform Commission as its principal aim of reform of choice of law rules in Australia.⁷⁹

As the Australian Law Reform Commission rightly noted, a bias toward the application of the law of the forum is a notable feature of the traditional choice of law rules inherited in Australia from English precedents.⁸⁰ This bias manifests itself in a broad definition of matters of procedure to be governed by the law of forum, including limitation rules⁸¹ and the assessment and quantification of damages.⁸² It also manifests itself in a tendency to interpret home statutes liberally in order to apply them to out-of-state situations.⁸³ The notorious rule in *Phillips v. Eyre*⁸⁴ that the High Court reinstated in *McKain*⁸⁵ requires each foreign tort action to be threaded through the eye of the forum’s needle.⁸⁶ The common law rules, as interpreted by the present

76. *Breavington v. Godleman*, 169 C.L.R. 41, 121 (1988); *see also id.* at 73-74, 98 (per Mason, C.J., and Wilson & Gaudron, J.J., respectively). This is still the view of Justices Deane and Gaudron. *See Goryl v. Greyhound Austl. Pty. Ltd.*, 120 A.L.R. 605, 610 (1994). The minority consisted of Justices Brennan, Dawson, and Toohey.

77. 174 C.L.R. 1 (1991). The majority consisted of Justices Brennan, Dawson, Toohey, and McHugh. In the intervening period, Justice Wilson retired and had been replaced by Justice McHugh.

78. *Id.* at 36-37.

79. Australian Law Reform Commission Report No. 58, *supra* note 2, ¶ 2.4.

80. *Id.* ¶ para. 1.13.

81. *McKain*, 174 C.L.R. at 1 (applying the forum’s statute of limitations).

82. *Stevens v. Head*, 176 C.L.R. 433 (1993) (ignoring capping by place of wrong).

83. *Guidera v. Government Ins. Office*, 11 M.V.R. 423 (1990) (New South Wales court applies New South Wales Motor Traffic legislation to the consequences of an accident arising out of the use of a car registered in New South Wales outside that state and where none of the parties involved were resident in that state).

84. 6 L.R.-Q.B. 1 (Eng. 1870).

85. *See* P.E. Nygh, *The Miraculous Raising of Lazarus*, 22 U.W. AUSTL. L. REV. 386 (1992).

86. *Jones v. T.C.N. Channel Nine Pty. Ltd.*, 26 N.S.W.L.R. 732 (1992) (plaintiff suing in New South Wales cannot recover punitive damages for defamation committed in Queensland). *Cf. Red Sea Ins. Co. Ltd. v. Bouygues S.A.*, [1994] 3 All E.R. 751 (a recent decision of the

majority of the High Court, favor the forum shopper. As Justice Deane said in *Stevens v. Head*,⁸⁷ the approach adopted by the current majority of the High Court of Australia “goes a long way towards converting the Australian legal system into a national market in which forum shoppers are encouraged to select between competing laws imposing different legal consequences in respect of a single occurrence.”⁸⁸

B. Choice of Law in Cross-vested Jurisdiction

The Jurisdiction of Courts (Cross-vesting) Act 1987 contains its own choice of law rules in section 11(1) that apply when “it appears to a court that the court will, or will be likely to” be exercising cross-vested jurisdiction.⁸⁹ Leaving aside the now largely theoretical possibility of exercising “procedural” cross-vested jurisdiction, there appear to be two such situations: (a) where a party raises a right of action under the written law of another state or territory that is not made applicable through the application of the choice of law rules of the forum⁹⁰ and (b) where a proceeding, whether originally lying in the cross-vested jurisdiction, is transferred pursuant to section 5 of the cross-vesting legislation.⁹¹ While the most obvious instance of a right of action arising under a written law is the case of a statutory cause of action created by legislation such as the Fatal Accidents Act, the definition may be wider. Justice Gummow has suggested that the words have a wider operation, including:

(i) an action which depends upon the written law for its enforcement even though not wholly owing its existence to the written law, and (ii) an action in which the defence against a common law liability or obligation is provided by the written law so that the determination of the action depends upon the operation of the written law, that law being the source of an alleged immunity to the liability or obligation alleged against the defendant. . . .⁹²

Privy Council on appeal from Hong Kong in which the law of the forum was excluded in favor of the law of the place of wrong).

87. 176 C.L.R. 433 (1993).

88. *Id.* at 462.

89. Jurisdiction of Courts (Cross-vesting) Act 1987 § 11(1).

90. *See* *Re an Alleged Incapable Person F.C.C. & The Protected Estates Act 1983*, 19 N.S.W.L.R. 541 (1990); *Re H & the Adoption Act [1990]* A.C.L.D. 1005. Of course, the interstate statutory right of action may also become applicable through a choice of law rule. This will depend on how the cause of action is pleaded. *See* *Jones v. T.C.N. Channel Nine Pty. Ltd.*, 26 N.S.W.L.R. 732 (1992).

91. *Waterhouse v. Australian Broadcasting Corp.*, 25 N.S.W.L.R. 519 (1991).

92. *David Syme & Co. v. Grey*, 115 A.L.R. 247, 260 (1993).

Section 11(1) sets out three choice-of-law rules. The first is the basic rule: the court shall apply the law of the forum, including choice of law rules.⁹³ In one sense this is the most radical rule; a transfer of a proceeding under section 5 might result in a change of the applicable law,⁹⁴ but the basic rule can only be applied where the jurisdiction is cross-vested by reason of a transfer of the proceeding.

The second rule applies when a party seeks to assert a right of action arising under a written law of another state or territory, the other method of invoking cross-vested jurisdiction. In this situation, the court shall “apply the written and unwritten law of that other state or territory.”⁹⁵ The interstate statute must, of course, apply to the situation before the court, but it need not be a law made relevant by the choice-of-law rules of the forum. In fact, choice-of-law rules are by-passed; the forum shopper can shop at home.⁹⁶

The operation of these rules can be illustrated by reference to the much litigated case of *Waterhouse v. Australian Broadcasting Corp.*⁹⁷ In that case the plaintiff had commenced proceedings for defamation in the Supreme Court of the Australian Capital Territory alleging to have been defamed throughout Australia in a telecast by the defendant. The action was brought in the normal (i.e., not cross-vested) jurisdiction of that court, but upon its transfer to the Supreme Court of New South Wales under section 5(2) of the Jurisdiction of Courts (Cross-vesting) Act 1987, it became cross-vested jurisdiction in that court.⁹⁸

Australian law does not have a single publication rule for multi-state defamation, but the tort is regarded as having been committed wherever the telecast is received.⁹⁹ The tort of defamation is codified in Queensland¹⁰⁰ and Tasmania¹⁰¹ and extensively amended by statute in New South Wales.¹⁰² In other jurisdictions the common law still largely applies.

The plaintiff's major concern was to recover punitive damages, a common-law right abolished in New South Wales but still alive and well in the

93. Jurisdiction of Courts (Cross-vesting) Act 1987 § 11(1).

94. *Australian Broadcasting Corp. v. Waterhouse*, 25 N.S.W.L.R. 519 (1991).

95. Jurisdiction of Courts (Cross-vesting) Act 1987 § 11(1)(b).

96. See SYKES & PRYLES, *AUSTRALIAN PRIVATE INTERNATIONAL LAW* 252 (3d ed. 1991).

97. See *Waterhouse v. Australian Broadcasting Corp.*, 97 F.L.R. 1 (A.C.T. 1989); *Australian Broadcasting Corp. v. Waterhouse*, 25 N.S.W.L.R. 519 (N.S.W. Ct. App. 1991); *Waterhouse v. Australian Broadcasting Corp.*, [1992] A.C.L.R. 145 N.S.W. 1 (cited in *David Syme & Co. Ltd. v. Grey*, 115 A.L.R. 247, 259-60 (1993) (per Gummow, J.)); *Waterhouse v. Australian Broadcasting Corp.*, 27 N.S.W.L.R. 1 (1992).

98. *Waterhouse v. Australian Broadcasting Corp.*, 97 F.L.R. 1 (1989).

99. *David Syme & Co. Ltd. v. Grey*, 115 A.L.R. 247 (1993).

100. Defamation Law of 1889 (Qld).

101. Defamation Act 1957 (Tas).

102. Defamation Act 1974 (NSW).

other jurisdictions. The transfer to New South Wales meant he could no longer rely on Australian Capital Territory law because of the operation of the basic rule. He could amend the pleadings to rely on New South Wales law alone pursuant to the basic rule, in which case he could refer to the laws of the other jurisdiction as the *loci delicti* under the choice of law rules of New South Wales. In that case, however, he could not recover any kind of damage not permitted by the law of the forum, prohibiting the recovery.¹⁰³ By invoking the statutes of Tasmania and Queensland directly through cross-vesting, the second rule was brought into operation: the New South Wales Court had to apply the whole law of those states, including their unwritten (common) law in so far as it implemented or supplemented the statutory cause of action pleaded. This meant that the law of New South Wales became irrelevant and that the plaintiff could assert the common-law right to punitive damages still existing in those states.¹⁰⁴ Whether he could ask the New South Wales Supreme Court in its cross-vested Queensland jurisdiction to assess damages on an Australia-wide basis will be an interesting question.¹⁰⁵

The third choice-of-law rule deals with the application of rules of evidence and procedure¹⁰⁶ and is as unorthodox as the second. Generally in Australia the law of the forum governs questions of evidence and procedure.¹⁰⁷ Because section 11(3) provides that, upon transfer, the transferee court shall deal with the proceeding as if all steps, including steps taken in the transferor court, had taken place in the transferee court, the usual inference is that the procedural law of the transferee court will apply.¹⁰⁸ This usual rule is subject to any order of the transferee court.

This third rule allows the court exercising cross-vested jurisdiction to apply the evidentiary and procedural rules of any state or territory "as the court considers appropriate in the circumstances."¹⁰⁹ This goes one step further than the second rule. The second rule did away with choice-of-law considerations but still requires applicability. The third rule offers a pure better law choice and does not seem to require any relevance. It would therefore be open to a transferee court to order that the statute of limitations of the transferor court should apply. Under section 13(b) of the cross-vesting legislation, no appeal can lie from the choice of procedural law made.¹¹⁰

103. *Jones v. TCN Channel Nine Pty. Ltd.*, 26 N.S.W.L.R. 732 (1992).

104. *Waterhouse v. Australian Broadcasting Corp.*, 27 N.S.W.L.R. 1 (1992).

105. *Compare Toomey v. Mirror Newspapers Ltd.*, [1985] 1 N.S.W.L.R. 173, *with David Syme & Co. v. Grey*, 115 A.L.R. 247 (1993).

106. *Jurisdiction of Courts (Cross-vesting) Act 1987* § 11(1)(c).

107. *Stevens v. Head*, 176 C.L.R. 433 (1993).

108. *Seymour-Smith v. Electricity Trust*, 17 N.S.W.L.R. 648, 662 (1989) (per Rogers C.J.).

109. *Jurisdiction of Courts (Cross-vesting) Act 1987* § 11(1)(c).

110. *Jurisdiction of Courts (Cross-vesting) Act 1987* § 13(b).

As the Australian Law Reform Commission pointed out, the provisions of section 11(1) do not resolve the problem of forum shopping: indeed it broadens the opportunities.¹¹¹ However, in certain cases, this provision may offer a like privilege to defendants who can invoke statutory rights of relief under interstate laws that would otherwise not have been available.¹¹² The Commission recommended that section 11(1) be replaced by the uniform rules it proposed.¹¹³

C. *Choice of Law in Diversity Jurisdiction*

The question of the law applicable in diversity jurisdiction is regulated by statute. Sections 79 and 80 of the Judiciary Act 1903 (Cth) direct courts exercising federal jurisdiction, (including the High Court¹¹⁴) to apply the common law and statutory law “in force in the State in which the Court in which the jurisdiction is exercised is held,”¹¹⁵ unless there is determinative federal law.

By itself, this rule would not be remarkable. Because the choice-of-law rules are largely defined at common law and are uniform, it makes little difference whether they form part of state or federal common law. The real relevance of these provisions lies in what state or territorial laws they incorporate as part of the law applicable in the High Court. Could state laws regulating the practice and procedure of their courts be invoked to regulate the practice and procedure of that august tribunal? In *John Robertson & Co. v. Ferguson Transformers Pty. Ltd.*¹¹⁶ Justice Mason drew a distinction between state laws regulating the practice of state courts generally, made applicable by sections 79 and 80, and state laws conferring powers on or regulating the practice of a named court that were not so translated.¹¹⁷ Although the remarks were dicta, the distinction has been applied in the Federal Court.¹¹⁸

The application of a state statute of limitations will thus depend on the registry of the High Court in which the action is commenced.¹¹⁹ But what happens if through remittal the venue is changed?

In *Commonwealth of Australia v. Dixon*¹²⁰ the plaintiff had filed a

111. Australian Law Reform Commission Report No. 58, *supra* note 2, ¶ 3.18.

112. *See, e.g.*, *Bankinvest A.G. v. Seabrook*, 14 N.S.W.L.R. 711 (1988).

113. Australian Law Reform Commission Report No. 58, *supra* note 2, ¶ 3.20.

114. *Musgrave v. Commonwealth*, 57 C.L.R. 514, 532 (1937) (per Latham, C.J.).

115. Judiciary Act 1903 § 80.

116. 129 C.L.R. 65 (1973).

117. *Id.* at 94-95.

118. *Trade Practices Comm’n v. Manfal Pty. Ltd.*, 97 A.L.R. 231, 243 (1990) (per Wilcox, J.).

119. *Pedersen v. Young*, 110 C.L.R. 162 (1964).

120. *Commonwealth of Australia v. Dixon*, 13 N.S.W.L.R. 601, 606 (1988) (per Hope, J.)

statement of claim in the Melbourne registry of the High Court in 1984 alleging a tort committed by the Commonwealth in 1965. The High Court remitted that action to the Supreme Court of New South Wales with a direction that “the action proceed in that Court as if the steps already taken in the action in this Court had been taken in that Court and as if Sydney had been stated in the writ to be the place of trial.”¹²¹ The relevant period of limitations was three years in Victoria and six years in New South Wales. At first glance it would appear to present what American conflicts scholars have described as a no conflict situation.

Not so in the eyes of the New South Wales Court of Appeal. Judge Hope took the view that the New South Wales limitation provision did not apply because the proceeding was commenced in Victoria.¹²² Neither was the Victorian limitations statute applicable since ss 79 and 80 of the Judiciary Act 1903 only made the law of New South Wales relevant in a court sitting in New South Wales. Accordingly the plaintiff was not statutorily barred.

Judge Samuels sought to avoid that absurdity by reading into the High Court’s direction an indication that section 79 should be applied as if the action had been instituted in New South Wales, making the New South Wales limitations statute applicable.¹²³ Judge Mahoney, on the other hand, took the view that under section 64 of the Judiciary Act 1903 the rights and liabilities of the Commonwealth should be determined by the law of the forum in which the action was instituted, bringing the Victorian statute into play.¹²⁴ In the end it was left to the trial judge to decide whether the Victorian or New South Wales bar should be applied.¹²⁵

It is clearly undesirable that a plaintiff should be able to avoid any limitations of law by invoking diversity jurisdiction. If the action had been retained by the High Court in Victoria, the Victorian bar would have been applied.¹²⁶ That position should not be changed to the detriment of the

(citing *Pederson v. Young*, 110 C.L.R. 162 (1964)); *Fielding v. Doran*, 60 A.L.R. 342 (1984); see also *Bargen v. State Gov’t Ins. Office (Qld.)*, 154 C.L.R. 318 (1982).

121. *Id.*

122. See *Pedersen*, 110 C.L.R. at 162 (1964); *Bargen v. State Government Ins. Office (Qld.)*, 154 C.L.R. 318 (1982); *Fielding v. Doran*, 60 A.L.R. 342 (1984).

123. *Commonwealth of Australia v. Dixon*, 13 N.S.W.L.R. 601, 613-14 (per Samuels, J.).

124. *Id.* at 624-27 (per Mahoney, J.).

125. *Id.* at 612 (per Hope, J.).

126. But see *Pedersen*, 110 C.L.R. at 168, 170 (per Menzies & Windeyer, JJ., respectively, suggesting that state statutes of limitation do not apply to proceedings in the High Court). This idea is contrary to the view expressed by Justice Mason in *John Robertson & Co. Ltd. v. Ferguson Transformers Pty. Ltd.*, 129 C.L.R. 65, 95 (1973).

defendant's rights by a remittal to another court.¹²⁷ Whichever view one takes, diversity jurisdiction offers the opportunity to escape the provisions of a limitations statute. The Australian Law Reform Commission did not recommend repeal of sections 79 and 80, but its recommendations as to choice of law in matters of procedure (which have been partially implemented for limitation periods) would sharply reduce the attractions of diversity jurisdiction to the forum shopper.¹²⁸

D. The Proposals of the Australian Law Reform Commission

In its proposals for uniform federal, state, and territorial choice-of-law rules, the Commission sought to reduce, though perhaps not eliminate, the forum bias which makes forum shopping feasible. It is not the purpose of this Paper to review the entirety of the recommendations of the Commission, a task that would require a paper of its own. The Commission suggested changes in the areas in which forum bias is most pronounced: the first limb of the rule in *Phillips v. Eyre*¹²⁹ and in matters of procedure.

1. The Rule in Phillips v. Eyre

The rule in *Phillips v. Eyre*, as restated by the High Court in *McKain v. R.W. Miller & Co. (S.A.) Pty. Ltd.*,¹³⁰ arguably¹³¹ sets out a double choice-of-law rule that measures the civil liability (i.e., the heads of damages recoverable) of the defendant by reference to both the law of the forum and the law of the place of wrong. According to the re-formulation of the rule by Lord Wilberforce in *Boys v. Chaplin*, on which it is based, the rule is subject to a flexible exception that in that case allowed the English court to apply the law of the forum to the exclusion of the law of the place of wrong.¹³² The Privy Council held in *Red Sea Insurance Co. Ltd. v. Bouygues S.A.* that in an appropriate case the flexible exception may justify the exclusion of the law of

idea is contrary to the view expressed by Justice Mason in *John Robertson & Co. Ltd. v. Ferguson Transformers Pty. Ltd.*, 129 C.L.R. 65, 95 (1973).

127. It has been the practice to require an undertaking from the defendant not to plead a shorter limitation period in the appropriate forum before granting a stay or making an order for transfer. See *Voth v. Manildra Flour Mills Pty. Ltd.* 171 C.L.R. 538 (1990); *Seymour-Smith v. Electricity Trust*, 17 N.S.W.L.R. 648 (1989).

128. A.L.R.C. Report, *supra* note 2, at para. 3.27.

129. 6 L.R.-Q.B. 1 (Eng. 1870).

130. 174 C.L.R. 1 (1991).

131. While the point is not made explicit and is left open in *Stevens v. Head*, 176 C.L.R. 433 (1993), this is now the accepted reading of *Boys v. Chaplin*, [1971] App. Cas. 356 (Eng.) on which the formulation is based. See *NORTH & FAWCETT*, *supra* note 5, at 540-42.

132. [1971] App. Cas. 356, 385 (Eng.).

the forum in favor of the law of the place of wrong.¹³³ The High Court of Australia has rejected the flexible exception, at least so far as torts committed within Australia are concerned.¹³⁴

The Commission has proposed that the primary rule in relation to torts should measure liability only by reference to the law of the place of commission of the tort,¹³⁵ thus restoring by legislation the position that, it appeared, a majority of the High Court had adopted in *Breavington v. Godleman*.¹³⁶ This primary rule should be liable to displacement in favor of the law of a place that in the circumstances has "a substantially greater connection" with the question or issue before the court.¹³⁷ To avoid the tendency of American courts to apply a similar principle in favor of the law of the forum, the Commission stressed that the displacement principle is to be seen as "exceptional" and subject to "a heavy onus" on the party seeking to avoid the law of the place of wrong.¹³⁸ Depending on its application, this caution would reduce, though not eliminate, the forum bias of the present rule and produce greater uniformity of outcome.

2. Procedure

Any change in the rules would be of little effect if the definition of "procedure" remained as broad as it is now. Indeed it can be argued in the light of the decision in *Stevens v. Head*¹³⁹ that any rule that does not determine the existence of a head of damages is a matter of procedure.

The Commission has recommended that in interstate cases all laws, except those that provide for the way a proceeding is conducted or a judgment is enforced, be classified as substantive and governed by the law governing the substantive issue.¹⁴⁰ In tort, the law of the place of wrong (unless the rule of displacement indicated a different law) would determine such matters as the application of a statute of limitations,¹⁴¹ the quantum of damages recoverable,¹⁴² the amount of prejudgment interest chargeable,¹⁴³ the discount rate to be charged in calculating future loss,¹⁴⁴ the remedies available,¹⁴⁵ the

133. [1994] 3 All E.R. 749 (Eng.).

134. *McKain v. R.W. Miller & Co. (S.A.) Pty. Ltd.*, 174 C.L.R. 1, 38-39 (1991) (per Brennan, Dawson, Toohey & McHugh, JJ.).

135. Australian Law Reform Commission Report No. 58, *supra* note 2, ¶ 6.27.

136. 169 C.L.R. 41 (1988).

137. Australian Law Reform Commission Report No. 58, *supra* note 2, ¶ 6.62.

138. *Id.* ¶ 6.59.

139. 176 C.L.R. 433 (1993).

140. Australian Law Reform Commission Report, *supra* note 2, ¶ 10.55.

141. *Id.* ¶ 10.33.

142. *Id.* ¶ 10.45.

143. *Id.* ¶ 10.54.

144. *Id.*

rules of evidence, and any presumptions to be applied.¹⁴⁶ However, the question of whether a civil jury could be called to try the matter would remain a matter of procedure.¹⁴⁷ This view is strongly supported by the present Chief Justice of the High Court¹⁴⁸ but remains distinctly a minority view.

The recommendations of the Commission have so far not received a considered reply from the governments concerned. However, they are being implemented in one area, limitation periods. The state of New South Wales has enacted the Choice of Law (Limitation of Periods) Act 1993 as part of uniform legislation to be enacted throughout Australia and New Zealand.¹⁴⁹ Section 5 of that statute provides that when the substantive law of another state or territory, or of New Zealand, is to govern a claim before a New South Wales court, a limitation statute of that other place is to be regarded as part of the substantive law. Under section 6, any discretion to extend the period of limitation must be exercised according to the same law.

Unfortunately the application of the statute is ambiguous as it relates to torts. As long as the High Court maintains the view that the rule is a double choice-of-law rule, the unfortunate plaintiff may be met by the worst possible solution — the plaintiff will be barred by the shortest period of the forum or the place of wrong.¹⁵⁰

IV. CONCLUSION

Australia offers a wide range of available forums. Indeed, following the entry into force of the Service and Execution of Process Act 1992 the initial choice facing the plaintiff is limitless. The abolition of nexus requirements is in itself commendable; such requirements led to jurisdiction being denied on mere technicalities such as determination of the place of contracting or breach. The present law directs the court to issues of the appropriate venue. However, it is my view that “the appropriate venue” in section 20 does not necessarily indicate a single venue, and the present law, like the old, continues to offer a plaintiff a choice of venue even if the stay or transfer provisions are taken into account. The principles to be applied on a stay application under section 20

145. *Id.* ¶ 10.36.

146. *Id.* ¶ 10.53.

147. *Id.* ¶ 10.18.

148. *McKain v. R.W. Miller & Co. (S.A.) Pty. Ltd.*, 171 C.L.R. 1, 29 (1991).

149. Choice of Law (Limitation Periods) Act 1993 (Vict.); Choice of Law (Limitation Periods) Act 1994 (W. Austl.); Limitation of Actions (Recovery of Taxes and Substantive Law) Amendment Act 1994 (S. Austl.).

150. This is the prevailing view under the Foreign Limitations Periods Act 1984 (Eng.). *See* NORTH & FAWCETT, *supra* note 5, at 80.

should be the same as apply to an application for transfer under section 5 of the cross-vesting legislation.

As Justice Gummow has pointed out in *David Syme & Co. v. Grey*,¹⁵¹ the cross-vesting provisions were designed to deal with gaps in substantive jurisdiction, not to offer further options in personal jurisdiction. Yet, even on this more restrictive basis, the provisions offer the plaintiff (and at times the defendant) the option of invoking the substantive law of another Australian jurisdiction without commencing suit there. The cross-vesting legislation therefore has a certain forum-shopping element. At the same time it is a clear instrument of doing justice. Through its transfer provisions the legislation can be used to overcome a problem frequently leading to multiple litigation—the limitation of the plaintiff's remedies in one jurisdiction, and, conversely, the defendant's inability to get adequate relief in the jurisdiction chosen by the plaintiff, leading each party to institute proceedings in different courts.¹⁵² The power to transfer proceedings under section 5 should therefore be exercised without undue regard for the choice made by the plaintiff, although it is probably true that there must be some onus of persuasion on the applicant for transfer.

Diversity jurisdiction, in so far as it is available to private litigants, has no redeeming value except as a means of avoiding limitation statutes. It was simply copied from the United States' system and is certainly not wanted by the High Court. As long as the forum bias remains part of our law, the judicious selection of the forum will offer the plaintiff a choice of law and outcome. This can to a certain extent be counteracted through the provisions for a stay under section 20(3) of the Service and Execution of Process Act 1992, and transfer under section 5 of the Jurisdiction of Courts (Cross-vesting) Act 1987 although the effect of remittal under section 44 of the Judiciary Act 1903 is dubious. Transfers and stays will not necessarily be granted because another forum is available and may not be granted where the effect will be to deprive the plaintiff of a legitimate juridical advantage such as a longer limitation period. The ultimate solution is to remove the bias through uniform reform of the choice of law rules. That process has now started piecemeal and is likely to be slow.

151. 115 A.L.R. 247 (1993).

152. *See e.g.*, *Bankinvest A.G. v. Seabrook*, 14 N.S.W.L.R. 711 (1988).

